



Designing Federal Permitting Programs

Committee on Regulation

Proposed Recommendation | December 4, 2015

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from Council and Conference members (with source shown in the margin).

1 Regulatory permits are ubiquitous in modern society, and each year dozens of federal
2 agencies administering their regulatory permit authority issue tens of thousands of permits
3 covering a broad and diverse range of actions.¹ The APA includes the term “permit” in its
4 definition of “license.” In addition to agency permits, the APA defines licenses to include “the
5 whole or part of an agency...certificate, approval, registration, charter, membership, statutory
6 exemption or other form of permission.”² Otherwise, the APA provides little elaboration on the
7 definition of a permit.³ For purposes of this recommendation, a regulatory permit is defined as
8 any administrative agency’s statutorily authorized, discretionary, judicially reviewable granting
9 of permission to do something which would otherwise be statutorily prohibited.⁴ This
10 recommendation treats any agency action that meets this definition as a permit, regardless of
11 how it is styled by the agency (e.g., “license,” “conditional exemption”).

¹ Eric Biber & J.B. Ruhl, *Designing Regulatory Permits 2* (2015),
<https://www.acus.gov/sites/default/files/documents/Licensing%20and%20Permitting%20Draft%20Report.pdf>.

² 5 U.S.C. § 551(8).

³ See Biber & Ruhl, *supra* note 1, at 3–4 (discussing lack of APA definition).

⁴ *Id.* at 4.



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12 Permits exist on a continuum of agency regulation, falling between exemptions (in which
13 an activity is not regulated at all) and prohibitions. Broadly speaking, there are two contrasting
14 approaches to permitting. In specific permitting, upon receiving an application, an agency
15 engages in extensive fact gathering and deliberation particular to the individual circumstances of
16 the applicant's proposed action, after which the agency issues a detailed permit tailored to the
17 applicant's situation.⁵ In their strictest form, specific permits can demand so much of the permit
18 applicant in terms of cost, information, and time that they closely resemble prohibitions.⁶
19 However, some specific permits can be lenient with relatively few conditions placed on regulated
20 entities.

21 In general permitting, an agency issues a permit that defines and approves a category of
22 activity on its own initiative, and allows entities engaging in that activity to readily take advantage
23 of the permit. Agency review of specific facts in any particular case is generally limited unless the
24 agency finds good cause to condition or withdraw the general approval.⁷ In their most flexible
25 form, general permits can resemble exemptions in form and effect, with few requirements on
26 regulated entities and relatively little agency oversight.⁸ On the other hand, general permits may
27 place requirements on regulated entities that aid agency oversight and enforcement. Some
28 permits toward the more general end of the spectrum require the regulated entity to provide
29 notice to the regulator and others do not.

30 Between general and specific permits lie many possible intermediate forms of permitting
31 that can exhibit traits of both general and specific permitting.⁹ These permits, referred to in this

⁵ *Id.* at 2.

⁶ *Id.* at 5.

⁷ *Id.* at 2.

⁸ *Id.* at 4-6.

⁹ *Id.* at 8-10 (discussing possible hybrid permitting and providing an example). For instance, some of the nationwide permits utilized by the Army Corps of Engineers to regulate the fill of wetlands pursuant to Section 404 of the Clean Water Act require permittees to provide notice to the agency before proceeding with development activities. The



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32 recommendation interchangeably as “intermediate” or “hybrid” permits, may call for
33 intermediate levels of agency review or intermediate requirements to be met by regulated
34 parties, or may contain a mix of features from both general and specific permitting. Intermediate
35 permits provide agencies with significant flexibility, allowing them to tailor permitting to the
36 regulated activity.

37 This recommendation focuses on the distinction between general and specific permits,
38 and considers intermediate permits as well. It does not specify situations in which exemptions
39 are appropriate or evaluate the extent to which general permits may be preferable to
40 exemptions. Marketable permits, in which permits are bought and traded by regulated entities,
41 may also prove beneficial to agencies, the regulated community, and the public in many
42 circumstances.¹⁰

43 General and specific permitting differ in both the system used to issue the permit and in
44 the way permits are issued under the system. In specific permitting, the agency issues a rule
45 outlining the process and standards for obtaining permits, after which regulated entities apply
46 for permits and the agency reviews the submissions, often with public input and judicial review.¹¹
47 In general permitting, the agency often promulgates a rule outlining the precise conditions under
48 which regulated entities may take advantage of the permit. This approach imposes significant
49 burdens on the agency upfront; however, once in place the process of permitting is relatively

notice may require substantial amounts of information (including detailed mitigation plans) and the permittee may not be able to proceed with development until directly authorized by the agency. These nationwide permits have elements of both a general permit (they apply to a category of activities, do not require the full range of applicant information that individual permits under Section 404 require, and do not require the agency to do the full amount of environmental review associated with individual permits) and a specific permit (they still require substantial information to be submitted by the applicant and may require prior approval by the agency before permitted activities can be initiated).

¹⁰ Permit marketability lies outside the continuum of general permits to specific permits.

¹¹ *Id.* at 6-7.



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50 streamlined and sometimes provides fewer opportunities for public input and judicial review.¹²
51 Although some agencies have traditionally relied primarily on specific permits, general permits
52 may offer agencies advantages in efficiency or resource use.

53 Most statutes delegate considerable discretion to agencies to decide at what point on the
54 spectrum from general to specific to implement a permitting system.¹³ Whether an agency
55 adopts a general or specific permitting system, or an intermediate system, can have significant
56 impacts on the agency, the regulated entities, and third parties affected by the permitting action.
57 If Congress decides to specify which type of permitting system an agency should adopt, Congress
58 may want to consider the guidance provided in this recommendation.

59 In recent years, there has been increasing public concern over the extent to which
60 inefficiencies in the permitting process delay necessary infrastructure reform.¹⁴ As an initial step,
61 in 2012, Executive Order 13604 established a steering committee to “facilitate improvements in
62 Federal permitting and review processes for infrastructure projects.”¹⁵ The order also established
63 an online permit-tracking tool, the Federal Infrastructure Projects Dashboard. The Steering
64 Committee and Dashboard serve to enhance interagency coordination and provide permit
65 tracking to improve agency timeliness.¹⁶ Congress has also been considering modifying the

¹² *Id.*

¹³ For example, the Migratory Bird Treaty Act provides almost no guidance as to the use of general versus specific permits. See 16 U.S.C. §§ 703-704. Section 404 of the Clean Water Act lays out specific factors that must be met in order to use general permits. See 33 U.S.C. § 1344(e)(1)-(2). Both of these programs are described in case studies accompanying the report.

¹⁴ See, e.g., Philip K. Howard, Common Good, Two Years Not Ten Years: Redesigning Infrastructure Approvals (2015), http://commongood.3cdn.net/c613b4cfda258a5fcb_e8m6b5t3x.pdf.

¹⁵ Performance of Federal Permitting and Review of Infrastructure Projects, 77 Fed. Reg. 18,885, 18,888 (Mar. 28, 2012) (to be codified at 3 C.F.R. pt. 100).

¹⁶ *Id.* at 18,887-8. The reforms promoted by EO 13604 are largely in accordance with the Administrative Conference’s Recommendation 1984-1, *Public Regulation of Siting of Industrial Development Projects*, 49 Fed. Reg. 29,938 (July 25, 1984). Specifically, Recommendation 1984-1 encouraged interagency coordination of permitting, the



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66 permitting process in various ways.¹⁷ In seeking to reform existing permitting systems or establish
67 a new permitting system, Congress and agencies should also be aware of the comparative
68 advantages of general and specific permits and design or modify such systems accordingly.

69 Although each permitting system is different, and an agency must tailor its procedures to
70 meet both its statutory mandate and the needs of the particular program at issue, agencies face
71 a number of common considerations when designing or reviewing a permitting system. There
72 are many circumstances in which general permits may save agencies time or resources over
73 specific permits without compromising the goals and standards of the regulatory program, and
74 this recommendation provides guidance on when an agency might benefit most from using a
75 general permitting system. This recommendation identifies a number of elements that should be
76 considered in determining whether an agency should adopt a general permitting system, a
77 specific permitting system, or an intermediate or hybrid system somewhere between the two.

RECOMMENDATION

78 Congressional Delegation of Permitting Power

79 1. ~~When Congress delegates permitting power to an agency, it should consider whether~~
80 ~~permitting is necessary, and if so, whether to specify which type(s) of permitting system(s) an~~
81 ~~agency may adopt. In so doing, Congress should be aware of the continuum from general to~~
82 ~~specific permits, as well as possible intermediate or hybrid forms that combine features of both~~
83 ~~general and specific permits.¹⁸~~

Commented [CA1]: Council Amendment

establishment of permitting deadlines, and timely processing of permit applications.

¹⁷ See, e.g., H.R. 348, 114th Cong. (2015); H.R. 351, 114th Cong. (2015); H.R. 89, 114th Cong. (2015); S. 33, 114th Cong. (2015); H.R. 161, 114th Cong. (2015). These bills are cited merely as indications of Congressional interest in the permitting process, and the Conference has not reviewed and does not endorse any of their provisions.

¹⁸ For a more complete discussion of the continuum between general permits and specific permits, see Eric Biber & J.B. Ruhl, *Designing Regulatory Permits* 5-6, 8-9 (2015).



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84 2. If Congress decides to limit an agency's permitting power to a certain type of permit,
85 it should consider the factors discussed in recommendations 3-4 when determining the
86 preferred type of permitting system to mandate. If Congress decides to give agencies
87 discretion on which system to adopt, Congress **may want to require should consider requiring**
88 that agencies make specific findings about factors discussed in recommendations 3-4 in order
89 to ensure agencies use general or specific permitting authority appropriately.

90 **Agency Establishment of Permitting Systems**

91 3. When an agency designs a permitting system, the agency should be cognizant of the
92 resources, both present and future, that are required to develop and operate the system. In
93 particular, the agency should consider that a general permitting system may require significant
94 resources during the design phase (especially if system design triggers additional procedural or
95 environmental review requirements) but relatively fewer resources once the system is in place.
96 A specific permitting system may require fewer resources upfront but significant resources in
97 its application. The agency should balance resource constraints with competing priorities and
98 opportunity costs.

99 4. An agency should consider the following additional factors when deciding what type
100 of permitting system, if any, to adopt.

101 (a) The following conditions weigh in favor of designing a permitting system toward
102 the more general end of the spectrum:

103 i. The effects of the regulated activity are small in magnitude, both in
104 individual instances and from the cumulative impact of the activity;

<https://www.acus.gov/sites/default/files/documents/Licensing%20and%20Permitting%20Draft%20Report.pdf>;
Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the
Administrative State*, 64 *Duke L.J.* 133, 155-69 (2014).



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- 105 ii. The variability of effects expected across instances of the regulated activity
106 is low;
- 107 iii. The agency is able to expend the upfront resources to design a general
108 permitting system, and can subsequently benefit from the reduced
109 administration costs a general permitting system requires to enforce; has
110 the necessary upfront resources to design the permitting system, and can
111 subsequently benefit from lower administration costs;
- 112 iv. The agency wishes to encourage the regulated activity or desires to keep
113 barriers to entry low;
- 114 v. The agency does not need to collect detailed information about the
115 regulated activity or regulated parties;
- 116 vi. The agency does not need to tailor permits to context-specific instances of
117 the activity;
- 118 vii. The agency does not need to monitor the regulated activity closely and
119 does not believe that the information that might be provided by specific
120 permits is needed to facilitate enforcement; or
- 121 viii. The agency does not need to exercise significant enforcement discretion
122 to readily enforce the permitting system.

123 (b) The following conditions weigh in favor of designing a permitting system toward
124 the more specific end of the spectrum:

- 125 i. The effects of the regulated activity are large in magnitude, both in
126 individual instances and from the cumulative impact of the activity;
- 127 ii. The variability of effects expected across instances of the regulated activity
128 is high;
- 129 iii. The agency is unable to expend the upfront resources necessary to design
130 a general permitting system, or the agency can absorb the higher
131 administration costs necessary to enforce a specific permitting system; The



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132 ~~agency is not able to expend the necessary resources upfront to design a~~
133 ~~general permitting system, or the agency has substantial resources that~~
134 ~~can be used for enforcement of the permitting system;~~

- 135 iv. The agency wishes to discourage the regulated activity, or desires to keep
- 136 barriers to entry high;
- 137 v. The agency needs detailed information about the regulated activity or
- 138 regulated parties;
- 139 vi. The agency needs to tailor permits to context-specific instances of the
- 140 activity;
- 141 vii. The agency needs to monitor the regulated activity closely, and concludes
- 142 the information provided in specific permits will facilitate enforcement; or
- 143 viii. The agency needs to have discretion in enforcing the permitting system
- 144 against individual entities.

145 (c) An agency should weigh all the factors and consider implementing a hybrid
146 permitting system that has features of both general and specific permits if the
147 factors described above do not weigh strongly in favor of either general or specific
148 permits or cut against each other.

149 **Agency Review of Existing Permitting Structures**

150 5. ~~Subject to budgetary constraints and other priorities, agencies are encouraged~~
151 ~~to~~Agencies should conduct periodic reviews of their existing permitting structures, consistent
152 with the Administrative Conference’s Recommendation 2014-5, *Retrospective Review of Agency*
153 *Rules*.

154 6. In reviewing existing permitting structures, agencies should consider the factors in
155 recommendations 3-4 and, where appropriate and consistent with statutory mandates,
156 consider reforming existing permitting systems to align more closely with the goals the agency
157 seeks to accomplish.

Commented [CMA2]: Siciliano Amendment: “This new text would recognize some of the factors that influence agencies’ retrospective review priorities and choices. Whether an agency should prioritize review of permitting regulations over other types of regulations implicates a host of considerations, including the costs and benefits of that particular choice.”



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158 7. Subject to budgetary and legal constraints, including the Paperwork Reduction Act
159 and other statutory restrictions on data collection and dissemination, agencies should consider
160 incorporating data-collection into new and existing permitting systems to aid analysis and
161 review.